Congress, the Commission should guard against the possibility that expanded channel capacity will simply mean more opportunities for MSOs to offer affiliated programming to the detriment of unaffiliated programming. Without channel occupancy limits, there is a strong likelihood that all of the newly available channels will be filled with services affiliated with the MSO. Although the Commission could revisit the need for limits in the future, an effective remedy will be much more difficult once channels are filled with affiliated programmers.

C. The Commission should Reconsider its Decision to Grandfather All Vertically Integrated Programming Services that were Carried as of December 1992.

CME/CFA is particularly troubled that the Commission has grandfathered the existing carriage of vertically integrated programs without citing any evidence as to the extent of the systems in compliance with the new rules. Second Report and Order at ¶ 94. Without knowing how many systems would not be in compliance, the Commission has no basis for its claim that application of the limits is outweighed by the need to avoid disruption of consumer service. Second Report and Order at ¶ 94. Given that Congress was prompted to act based on the market power that derives from existing levels of vertical integration, the Commission's decision to grandfather all vertically integrated programmers that currently exceed the channel occupancy limits

has rendered impotent its regulations and Congress' intent.[11] Moreover, by freezing the vertical relationships as they are, the Commission has rewarded the very MSOs that ushered in vertical integration and practiced the discriminatory business tactics that Congress sought to address. The Commission's decision frustrates the development of unaffiliated programming, and should therefore be reconsidered.[12]

D. The Commission Should Reconsider the Attribution Standards Applied to Both Subscriber Limits and Channel Occupancy Limits

The Commission decided to use the same attribution standards that it uses in connection with its broadcast ownership rules for both the subscriber limits and channel occupancy limits. Second Report and Order at ¶¶ 34-35, 61-63. As CFA demonstrated in its earlier reply comments, however, these standards are too liberal and do not reflect the reality that influence is just as harmful as control. Consumer Federation of America Reply Comments, MM Docket No. 92-264, at 4-5 (Sept. 3, 1993) ("CFA Reply").

In particular, CME/CFA object to the exception that does not attribute any minority ownership interests where a single

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[11] At the very least, the Commission should clarify the facts on which it made the decision to grandfather its rules. The Second Report and Order does not cite any information regarding the number of operators that currently exceed the limits. The Commission merely states that it does not want to disrupt subscriber services. But without accurate statistics, the public has no way to estimate the disruption that might be caused by immediately implementing the rules.

[12] Congress did not specifically sanction the grandfathering of channel occupancy limits as it did with other cable act provisions. 42 U.S.C § 548(h). This is persuasive evidence that the Commission has acted contrary to Congressional intent.

shareholder owns 51% of a corporation. This is an unduly mechanistic principle which ignores longstanding policy in other areas to test for ownership based on many indicia, including the entity's ability to influence the actual operation of the property. This approach overlooks the reality that there are often contractual arrangements under which a single majority shareholder is forced to enter into arrangements with cable partners where the minority cable operator partners have a substantial voice in the operation of the company. To give just one example, Ted Turner owns 53% of the voting shares of Turner Broadcasting, but two of his minority partners, TCI and Time Warner, have through the combination of guaranteed Board representation, a super-majority voting requirement, and a voting agreement, the right to block any investments in excess of $1 million.[13] It is a matter of record that TCI and Time-Warner used that power to veto Turner's proposed acquisition of the Financial News Network several years ago. The interests in Turner Broadcasting's cable systems and program services should clearly be attributed to TCI and Time Warner notwithstanding Ted Turner's interest in the company. Yet, the attribution rules adopted by the Commission have the opposite effect and should be changed on reconsideration.

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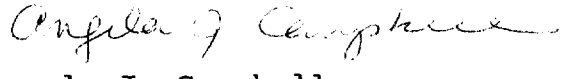
[13] Among many of the companies with a single majority shareholder and substantial cable operator holdings are Discovery Communications (49% TCI) and The Family Channel (11% TCI).

CONCLUSION

For the foregoing reasons, CME/CFA request that the Commission adopt lower subscriber limits, clarify that the subscriber limits apply to telephone subscribers served by a combined telephone and cable operator, adopt lower (20%) channel occupancy limits, exclude PEG, must carry and leased access channels when applying channel occupancy limits, apply channel occupancy limits regardless of the number of activated channels, and reconsider its decision to grandfather existing carriage of vertically-integrated programming in excess of the channel limits.

Respectfully submitted,



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